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CPLR 3015(d): Failure to Itemize Special Damages Does Not Render Complaint Insufficient

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CPLR 3012(b) provides that a defendant may serve a written demand for a complaint if it was not served with the summons. It also states that a demand for a complaint does not constitute an appearance in the action. Therefore, the defendant in *Frale*y need not have feared subjecting itself to the jurisdiction of the New York court by merely demanding a complaint. If the defendant had served a written demand for a complaint and had not received it within 20 days, a motion to dismiss under CPLR 3012(b) would have been appropriate.

CPLR 3014: Motion to compel plaintiff to separately state and number causes of action to be granted if complaint incomprehensible.

In the orderly process of justice it is necessary that a defendant be reasonably apprised of the charges made against him. As a means to this end, CPLR 3014 provides that every claim must consist of consecutively numbered paragraphs, each containing, as far as practicable, a single allegation. If the complaint is incomprehensible, a motion to compel the plaintiff to separately state and number the causes of action alleged will be granted. In accord with the general philosophy of the CPLR, however, a defendant cannot attain relief under this rule unless his rights are actually prejudiced, *i.e.*, if he is unable to answer because the complaint is truly incomprehensible.¹⁵¹

In *Consolidated Airborne Systems, Inc. v. Silverman*,¹⁵² the defendant's motion to require separate statement and numbering was denied. His appeal from this denial was considered by the appellate division to be one of right, since the order affected his substantial rights.¹⁵³

There would seem to be no doubt that the defendant's right to understand allegations made against him is indeed "substantial"—to deny this right, would be, in effect, a violation of due process of law.

CPLR 3015(d): Failure to itemize special damages does not render complaint insufficient.

CPLR 3015(d) requires the itemization of special damages as a device to eliminate the bill of particulars formerly required under the CPA.¹⁵⁴ However, the bill of particulars was restored without

¹⁵¹ 3 WEINSTEIN, KORN & MILLER, NEW YORK CIVIL PRACTICE ¶ 3014.03 (1964).

¹⁵² 23 App. Div. 2d 695, 257 N.Y.S.2d 827 (2d Dep't 1965).

¹⁵³ *Ibid.*; see 3 WEINSTEIN, KORN & MILLER, *op. cit. supra* note 151, at ¶ 3014.09.

¹⁵⁴ RCP 116(i).

the elimination of 3015(d), thus posing a question as to how far this requirement was to go.

The second department answered the question recently in *Von Ludwig v. Schiano*,¹⁵⁵ where it held that the "itemization of special damages may be obtained by a bill of particulars." The omission from the complaint would only render a cause of action insufficient where special damages are an integral part of the cause of action itself, *e.g.*, a *prima facie* tort.¹⁵⁶

CPLR 3017: Fiduciary relationship not necessary for an accounting?

An accounting has traditionally been a creature of equity. Lacking the appropriate equitable grounds, *i.e.*, a fiduciary relationship between the plaintiff and the defendant, this remedy was unavailable to plaintiff.

The appellate division has recently taken a more liberal approach to this problem. In *Kamisky v. Kahn*,¹⁵⁷ the court observed that it might grant a legal or an equitable remedy to afford complete relief to a party. It appears, therefore, that the lack of a fiduciary relationship will not impede the availability of an accounting. Although there is no direct holding in *Kaminsky* that an accounting may be granted in a law action, the case indicates a trend toward such a determination.¹⁵⁸

CPLR 3024(b): Motion to strike unavailable where material in complaint is relevant at trial.

In *Guiliana v. Chiropractic Institute*,¹⁵⁹ manipulation of the plaintiff's spine by a student of the defendant Institute resulted in severe injury. In the complaint, the plaintiff sought, *inter alia*, to place in issue the lack of chiropractic skill and knowledge of the student body of defendant Institute. In granting the defendant's motion to strike those paragraphs under CPLR 3024(b), the court quoted with approval the statement of a pre-CPLR case that "matter, though possibly pertinent as proof, has no place in a pleading if it is unnecessary to a statement of a cause of action."¹⁶⁰

However, under CPLR 3024(b) a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a

¹⁵⁵ 23 App. Div. 2d 789, 258 N.Y.S.2d 661 (2d Dep't 1965).

¹⁵⁶ For a thorough discussion of this problem, see 7B MCKINNEY'S CPLR 3015, *supp. commentary* 82 (1965).

¹⁵⁷ 23 App. Div. 2d 231, 259 N.Y.S.2d 716 (1st Dep't 1965).

¹⁵⁸ For a further study of *Kaminsky* and its implication, see 7B MCKINNEY'S CPLR 3017, *supp. commentary* 92 (1965).

¹⁵⁹ 45 Misc. 2d 429, 256 N.Y.S.2d 967 (Sup. Ct. Kings County 1965).

¹⁶⁰ *Newton v. Livingston County Trust Co.*, 231 App. Div. 355, 362 N.Y. Supp. 121 (4th Dep't 1931).